

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE SANDS,

Plaintiff,

-against-

CBS INTERACTIVE INC.,

Defendant.

Case No. 18-cv-07345 (JSR)

ECF Case

DECLARATION OF ELEANOR M. LACKMAN

ELEANOR M. LACKMAN declares as follows:

1. I am a member of the Bar of this Court and a partner in the law firm of Cowan, DeBaets, Abrahams & Sheppard LLP, attorneys for defendant CBS Interactive Inc. (“CBSi”) in this proceeding. I submit this declaration in support of CBSi’s motion for leave to amend and supplement its answer (the “Motion to Amend”) filed on September 18, 2018 (the “Original Answer”), to include two related causes of action for breach of contract and breach of the covenant of good faith and fair dealing pertaining to plaintiff Steve Sands’ (“Plaintiff” or “Sands”) bad faith conduct prior to, and during, this litigation.

2. In the past three years alone, Sands has filed nearly 60 essentially-identical copyright lawsuits. The Court may take judicial notice of public court filings from the website located at the following URL:¹

¹ See *Jean-Laurent v. Hennessy*, No. 05CV1155(JFB)(LB), 2008 WL 3049875, at *8 (E.D.N.Y. Aug. 1, 2008) (taking judicial notice of docket sheet at summary judgment stage); *BWP Media USA Inc. v. Rich Kids Clothing Co., LLC*, 103 F. Supp. 3d 1242, 1246 (W.D. Wash. 2015) (taking judicial notice of the number of “essentially identical” suits filed by plaintiff’s firm).

<https://dockets.justia.com/search?parties=Steve+Sands&nos=820&cases=mostrecent&sort-by-last-update=false>.

3. On April 29, 2018, Sands initiated a lawsuit against CBSi, relating to CBSi's allegedly unauthorized use on the website located at the URL www.gamespot.com on November 6, 2016 of a photograph of actor Benedict Cumberbatch, purportedly taken by Plaintiff on the set of *Doctor Strange* (the "Cumberbatch Lawsuit"). Attached hereto as **Exhibit A** is a true and complete copy of the complaint filed in the Cumberbatch Lawsuit.

4. On June 12, 2018, Sands initiated another lawsuit against CBSi, relating to CBSi's allegedly unauthorized use on the website located at the URL www.cbsnews.com (the "CBS News Website") on January of 2016² of a photograph of actress Krysten Ritter on the set of *Jessica Jones* ("the Ritter Lawsuit"; together, with the Cumberbatch Lawsuit, the "Prior Lawsuits"). Attached hereto as **Exhibit C** is a true and complete copy of the complaint filed in the Ritter Lawsuit.³

² While the complaint in the lawsuit initiated regarding the photograph of Krysten Ritter does not identify the date of initial publication on the CBS News Website, materials publicly available on the Internet Archive's Wayback Machine (the "Wayback Machine"), of which the Court may take judicial notice for purposes of this Motion to Amend, demonstrate that the article in question first appeared online in January of 2016. Attached hereto as **Exhibit B** is a true and complete copy of the Wayback Machine's "calendar view map," available at https://web.archive.org/web/20160615000000*/https://www.cbsnews.com/pictures/what-to-stream-on-netflix-buzziest-shows/14/. See *Martins v. 3PD, Inc.*, No. 11-cv-11313, 2013 WL 1320454, at *16 n.8 (D. Mass. Mar. 28, 2013) (taking judicial notice of "the various historical versions of [a website] available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned").

³ On January 25, 2017, Sands filed a lawsuit against CBSi relating to CBSi's use of a photograph of actors Krysten Ritter and Michael Cotler (the "Ritter and Cotler Lawsuit"), which documents show he voluntarily withdrew five days later after realizing that CBSi had properly licensed the photograph. Attached hereto as **Exhibit D** is a true and complete copy of correspondence between Sands' counsel, Richard Liebowitz, and CBSi's counsel, wherein Liebowitz concedes that CBSi properly licensed the photographs at issue in the Ritter and Cotler Lawsuit, and agrees to withdraw the action.

5. Both the Prior Lawsuits were resolved between Sands and CBSi. Attached hereto as **Exhibit E** is a true and complete copy of the settlement agreement, entered into on May 21, 2018, between Sands and CBSi in resolution of the Cumberbatch Lawsuit (the “Cumberbatch Settlement Agreement”).⁴ Attached hereto as **Exhibit F** is a true and complete copy of the settlement agreement, entered into on July 25, 2018, between Sands and CBSi in resolution of the Ritter Lawsuit (the “Ritter Settlement Agreement”; together, with the Cumberbatch Settlement Agreement, the “Settlement Agreements”).

6. Sands filed the instant action (the “Instant Lawsuit”) on August 14, 2018, regarding CBSi’s use on October 7, 2016 of photographs purportedly taken by him on the set of Netflix’s “The Punisher” television series (the “Punisher Photographs”), despite having resolved “all claims” between himself and CBSi pursuant to the Settlement Agreements. *See id.* at Recitals, § 1.

7. During his deposition, Sands admitted that he was aware that entities were using the Punisher Photographs – without having licensed such photographs, and without giving him attribution – shortly after their initial publication, on October 6, 2016. *See Exhibit G*, attached hereto, a true and complete copy of excerpts from the transcript of the deposition of Steve Sands, dated January 10, 2019, at 77:7–77:23.

8. In Sands’ motion for summary judgment in the Instant Lawsuit (“Plaintiff’s Motion for Summary Judgment”), filed on January 25, 2019, Sands asserts that “CBSi has been sued for copyright infringement at least 16 times in this District,” and that CBSi “‘settled,’ ‘settled in principle,’ ‘resolved,’ and/or ‘dismissed with prejudice’” 14 out of 16 of those suits —

⁴ Under the terms of the Settlement Agreements (as defined in ¶ 5 herein), CBSi has sought and obtained the Court’s permission to file the entire Settlement Agreements under seal, and disclose specific contents of the Settlement Agreements herein for the purposes of this Motion to Amend. All terms of the Settlement Agreements that are pertinent to this Motion to Amend are identical.

including the Cumberbatch and Ritter Lawsuits — to support his argument that CBSi should be held liable for willful copyright infringement. Dkt. No. 18 at 1, 23; Dkt. No. 20 ¶¶ 16–18.

9. Attached to Plaintiff’s Motion for Summary Judgment was a declaration from his attorney, Richard Liebowitz, who included a chart purportedly detailing settlements entered into by CBSi, Dkt. No. 20-5, and 74 pages of docket entries from copyright infringement cases that CBSi purportedly settled. Dkt. No. 20-6.

10. Plaintiff’s Motion for Summary Judgment specifically referenced the Prior Lawsuits and that they were “settled in principle” and used the settlement of these lawsuits as purported evidence that CBSi was liable for infringement in the past and is therefore liable for willful copyright infringement in the Instant Lawsuit. Dkt. No. 18 at 23; Dkt. No. 20 ¶ 18.

11. Following CBSi’s discovery during depositions that Sands likely had knowledge of CBSi’s use of the Punisher Photographs during the negotiations of the Settlement Agreements, which were meant to resolve “all claims” between Sands and CBSi, and Sands’ use of the fact of settlement as evidence of CBSi’s liability and in support of his argument that CBSi committed willful infringement in the Instant Lawsuit, CBSi initiated a teleconference with Sands’ counsel and the Court on January 29, 2019 to seek leave to amend or supplement its Original Answer to add two counterclaims for breach of the Settlement Agreements and breach of the implied covenant of good faith and fair dealing.

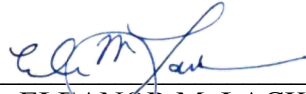
12. The Court then directed CBSi to file the instant Motion to Amend.

13. Attached hereto as **Exhibit H** is a true and complete copy of CBSi’s proposed amended Answer and Counterclaims (the “Proposed Amended Answer”).

14. Attached hereto as **Exhibit I** is a true and complete copy of a redlined version of the Proposed Amended Answer, which shows the proposed amendments to CBSi's Original Answer.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
February 6, 2019



ELEANOR M. LACKMAN